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NO. 83-624

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

MASHPEE TRIBE, ET AL.,
Petitioners,

v.

JAMES G. WATT, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether both the trial and appellate courts properly concluded that a puntative indian "tribe" and its individual members could not maintain an action seeking to recover their "ancestral" land, where a jury has previously determined that they do not constitute a "tribe" and where they seek not only to relitigate their status but also to raise claims and theories not raised in the prior action.

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STATEMENT OF THE CASE

This is the third time within three years this Court will have the opportunity to consider a writ of certiorari regarding claims relating to individuals calling themselves the "Mashpee Tribe". The Court has previously denied to issue a writ in Mashpee Tribe v. Town of Mashpee, 447 F.Supp. 940 (D. Mass. 1978), aff'd sub nom. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979), cert. denied, 444 U.S. 866 (1979), and Mashpee Tribe v. New Seabury Corp., cert. denied, ___U.S. ____, 52 U.S.L.W. 3249 (October 1, 1983).

Additionally, the "Mashpee Tribe" filed a Motion for Leave to file an original jurisdiction complaint with this Court captioned Wampanoag Indian Nation, et al. v. Commonwealth of Massachusetts, but later withdrew the motion.

This particular case started on December 18, 1981, when three hundred and thirty-four (334) individuals claiming to be members-descendents of the alleged Mashpee Tribe commenced an action in the United States District Court for the District of Massachusetts, on their own behalf and on behalf of the Mashpee Tribe. By this action the Plaintiffs sought to recover what they consider to be tribal lands allegedly conveyed by their ancestors in violation

of the Constitution and federal statutes.[1] The Plaintiffs' primary assertion is that the Commonwealth of Massachusetts and the Town of Mashpee, by authorizing and validating the conveyances of certain lands in question,[2] violated their rights under the Constitution, the Indian Nonintercourse Act, 25 U.S.C. § 177, (the Nonintercourse Act) and numerous

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1/ A comprehensive treatment of these transactions can be found in the prior case filed dealing with the instant issues. See Mashpee Tribe v. Town of Mashpee, 447 F.Supp. 940, 943-947 (D. Mass. 1978), aff'd sub nom. Mashpee Tribe v. New Seabury Corp. 592 F.2d 575 (1st Cir.) cert denied, 444 U.S. 886 (1979)

2/ The Plaintiffs allege that the Commonwealth of Massachusetts violated the Nonintercourse Act when the Massachusetts General Court enacted 1869 Mass. Acts 463 and 1870 Mass. Acts 293 regarding the conveyance and transfer of certain land in the Town of Mashpee.

other federal and state statutes. The Plaintiffs sought declaratory and injunctive relief as well as damages.

This, however, was not the first time that a group of individuals calling themselves the "Mashpee Tribe" filed a Nonintercourse Act claim seeking recovery of the land claimed in the instant case. On August 26, 1976, a complaint was filed by the alleged Mashpee Tribe against virtually the same defendants seeking recovery of the same land claimed in the case at bar. Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978), aff'd sub nom. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.) cert. denied, 444 U.S. 866 (1979) (Mashpee I). Just as in the instant action, their claim was based on the assertion

that their rights under the Nonintercourse Act had been violated by the actions of Massachusetts General Court by its enacting 1869 Mass. Acts 463 and 1870 Mass. Acts 293. It did not advance all of the causes of action the Plaintiffs now seek to raise nor did Plaintiffs' counsel make the Nonintercourse Act argument current counsel seeks to advance. Still, the basic cause of action and the parties were identical to those in the claim which spawns this, their third petition for certiorari.

In Mashpee I the threshold issue of tribal existence for purposes of the Nonintercourse Act was tried for forty (40) days. The jury found that the Plaintiffs were unable to prove that they were indeed an indian tribe at certain critical dates, including the

date on which the case was initiated, in order to invoke the application of the Act. Therefore, the Mashpee I case was dismissed on the merits. The Court of Appeals affirmed that decision, Mashpee Tribe, 592 F.2d 575 (1st Cir. 1979), and this Court thereafter refused to accept certiorari, 444 U.S. 866 (1979).[3/]

On June 30, 1982 the District Court dismissed the instant action. Mashpee Tribe, et al. v. James G. Watt, et al., 542 F.Supp. 797 (D. Mass. 1982) (Mashpee II). In dismissing the Plaintiffs' case, the District Court held inter alia, that the tribal claims were barred by the

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3/ Four years after final judgment on Mashpee I the Plaintiffs unsuccessfully attempted to reopen the case at the appellate level of the federal courts. See Mashpee Tribe, cert. denied, ___ U.S.___, 52 U.S.L.W. 3249 (October 4, 1983)

doctrines of res judicata and collateral estoppel as a result of the decision in Mashpee I. The Court also held that the Nonintercourse Act does not provide for individual claims for relief, and that the plaintiffs myriad other causes failed to support a claim. The decision was affirmed by the Court of Appeals for the First Circuit in a two page per curiam opinion, Mashpee II, 707 F.2d at 25 (1st. Cir. 1982). The Plaintiffs have now filed this petition for writ of certiorari.

ARGUMENT

THIS, THE PETITIONERS' THIRD WRIT, SHOULD BE DENIED, BECAUSE THE LOWER COURTS CORRECTLY DISMISSED THE ACTION USING WELL ESTABLISHED PRINCIPLES OF FINALITY OF JUDGMENTS.

An examination of the decisions below in both the instant case and Mashpee I clearly demonstrates that

there is no reason to grant the requested Writ of Certiorari. This case does not present important indian law issues which have divided the lower federal courts. Instead, it provides a straight-forward application of the fundamental rule of judicial repose embodied in the twin doctrines of res judicata and collateral estoppel. In short, there is no important question of federal law presented which should be settled by this Court which has not already been settled. The Lower Courts have not departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. Rather the decisions below are well reasoned

and based on axiomatic legal principles.

Clearly, the Court of Appeals acted properly in dismissing this case on the basis of res judicata. In Mashpee I, the Plaintiffs, claiming to be members-descendents of the Mashpee Tribe, brought an action against virtually the same Defendants as are named in the instant action. They claimed the Defendants authorized the alienation of the same land at issue in this case in contravention of the Indian Nonintercourse Act, the same Act which forms one of the grounds for the Plaintiffs' instant case. The Court dismissed Mashpee I on the merits. Therefore, since the basic conditions of res judicata are satisfied, the Plaintiffs are now estopped from relitigating these claims in the instant case. See Restatement (Second) of

Judgments §19; Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n. 5 (1979). The fact that we are presented here with an indian land claim presents no reason to depart from this fundamental rule of repose. As this Court only recently observed, in cases where the Plaintiff seeks to relitigate questions which affect title to land, the notions of finality and res judicata are "at their zenith" and, when once decided, should be considered no longer subject to change. Nevada v. United States, ___ U.S.____, 103 S. Ct. 2906, 2918 n. 10 (1983).

There is little merit to the Plaintiffs' argument that the decision in Mashpee I was a decision as to jurisdictional standing and not on the merits. It is abundantly clear that the Plaintiffs in Mashpee I sufficently

asserted an actual injury as a direct result of alleged illegal conduct, that the injury was allegedly caused by the acts of the Defendants, and that it was likely to be redressed by a favorable decision of the Court, thereby overcoming the jurisdictional barrier of standing. See Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471-472 (1982). After forty (40) days of a trial in which the Plaintiffs failed to establish tribal existence, a critical element of its prima facia case, the Court in Mashpee I was quite specific in ordering "that this action be DISMISSED on the merits, the Plaintiff not having established its standing to bring suit as an Indian

tribe. (emphasis supplied) See Mashpee I, 447 F.Supp. at 950[4/]

The Plaintiffs argue that res judicata is not a bar to the instant action because in the present case, unlike Mashpee I, the claims of individual Indians are asserted. The doctrine of res judicata bars a suit by not only actual parties but also those whose interests are in privity with them. See Montana v. United States, 440 U.S. 147, 153-54 (1979). This Court should not tarry long in deciding whether individual members of a tribe are in privity with that tribe regarding actions brought on behalf of the alleged tribe as a whole.

4/ The fact that the case went to trial for forty (40) days in and of itself is persuasive in rebutting the Plaintiffs' twin assertions that the decision in Mashpee I was not on the merits and that it was not based on a fair process.

Apart from the above analysis the Plaintiffs' claims are barred by the doctrine of collateral estoppel. Since the Plaintiffs in the instant case had a full and fair opportunity to prove their tribal status under the Nonintercourse Act in Mashpee I, they are now barred from relitigating this issue on the basis of collateral estoppel. Since the proof of tribal status is an essential element in the case at bar, the Plaintiffs' claim must fail and the action was properly dismissed.

Individual indian claims must fail for an additional reason. The individual Plaintiffs assert they have independent claims under the Non-intercourse Act. When the District Court articulated in its detailed review

of the statutory history of the Act,[5] it correctly determined that the Act supported only causes of action brought by an indian "nation or tribe" and not by individual indians. Prior judicial opinions hold the same. Epps v. Andrus, 611 F.2d 915 (1st Cir. 1979); Joint Tribal Council of the Passamaqoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975). There is no reason for this Court to review those decisions in this case not only because they are correct, but also because principles of finality of judgment will prevent the Court from ever reaching this argument on the merits.

5/ See Mashpee II, 542 F.Supp. at 803-06.

CONCLUSION

The Petitioners' application for a Writ of Certiorari should be denied.

Respectfully submitted,

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